

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

DISTRICT HOSPITAL PARTNERS, L.P. D/B/A)	
GEORGE WASHINGTON UNIVERSITY)	
HOSPITAL, A LIMITED PARTNERSHIP, AND)	
UHS OF D.C., INC., GENERAL PARTNER,)	
)	
and)	CASE NOS. 05-CA-216482
)	05-CA-230128
1199 SERVICE EMPLOYEES INTERNATIONAL)	05-CA-238809
UNION, UNITED HEALTHCARE WORKERS)	
EAST, MD/DC REGION A/W SERVICE)	
EMPLOYEES INTERNATIONAL UNION.)	

**RESPONDENTS' REPLY BRIEF TO
CHARGING PARTY'S RESPONSE TO RESPONDENT'S [sic] EXCEPTIONS
TO ALJ'S DECISION ISSUED SEPTEMBER 24, 2019**

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District Hospital Partners, L.P. d/b/a The George Washington University Hospital, A Limited Partnership (“the Hospital” or “GWUH”), and UHS of D.C., Inc., General Partner (“UHS”) (collectively, “Respondents”), by and through their undersigned attorneys and pursuant to Section 102.46 of the Board’s Rules and Regulations, hereby file their Reply to Charging Party’s (“the Union”) Response to Respondent’s [sic] Exceptions.¹

I. Wages

The Union makes a number of misstatements about the course of bargaining proceedings, many of which concern the Parties’ negotiations over **Wages**.

The Hospital made its first **Wages** proposal on May 18 and 21, 2018. (R. Ex. 1 at 3641-3643, 3640.) The Hospital meticulously explained the proposal, including the merit and bonus components that were being proposed. (R. Ex. 3 at 0303.) The Hospital did not have the “Appendix B” (ranges and differentials) finalized for discussion that day, but committed to providing it to the Union at their next session, Monday, May 21, and subsequently did so. (R. Ex. 3 at 0314; *see also* R. Ex. 1 at 3651-3654 (05/21 Appendix B).)

As the Parties continued to discuss the Hospital’s initial **Wages** proposal, Godoff asked for the proposed YOE for each employee, and Bernstein candidly admitted that the calculation was a process the Hospital had not yet undertaken. (R. Ex. 3 at 0317.) At the next sessions, July 31-August 1, the Parties again discussed the Hospital’s **Wages** proposal, and by then, the Hospital had completed the process of calculating YOE for all bargaining unit employees, and provided the data to the Union at that time. (R. Ex. 3 at 0351-0352 (on August 1, 2018, Schmid reviewing how to read the spreadsheet using committee member Bey, who was awarded 20.63 YOE, as an example, and Barner stating she understood the explanation), 0395-0396 (on October

¹ Due to page limits, the Hospital is unable to address all issues raised by the Union’s Response, and as such, this Reply does not indicate agreement with the Union’s positions or waive any defenses or arguments not included in this Reply. Herein, the Union’s Response will be cited as “UR at [page number].”

1, Schmid reminding Godoff that she had already provided the Union with employee YOE information)). Placements in the ranges were also subject to negotiation, with Bernstein and Schmid notifying the Union that the Hospital would consider all information regarding individual employee placements. *See, e.g.*, R. Ex. 3 at 0352 (Bernstein stating, “We’re willing to review anything the employee or you all present to us that suggests our [YOE] calculations were off”); R. Ex. 3 at 0401-0402 (confirming Hospital will review any YOE information); Tr. at 605:3-22). The Hospital even arranged for the Union to have cafeteria access so that it could review the data with individual bargaining unit members. (Tr. at 138, 582-83; R. Ex. 3 at 0395 (Bernstein referencing prior discussion about making cafeteria available for union to discuss placements with staff).) These facts are directly contrary to the Union’s contentions (without citations) that “No such process [determining employee YOE] ever was undertaken prior to Respondent’s withdrawal of recognition from and refusal to bargain with 1199 SEIU” (UR at 8), and that, “Respondent never did reveal where it intended to place bargaining unit employees in accordance with their experience” (UR at 18-19).²

At the time of the withdrawal in October, the Union had not even attempted a counter to the Hospital’s initial **Wages** proposal. (Tr. at 114; *see also* R. Ex. 3 at 0400 (on October 10, Schmid pointing out that Union had Hospital’s Wage proposal since May and had not yet countered it).) This despite the fact the Union had possessed the Hospital’s **Wage** proposal, to include ranges and differentials, since May, and the data regarding the award of YOE to individual employees since August 1.

² This is not the first time Godoff has “forgotten” information provided to him, as he also “forgot” that he had YOE information for individual employees on October 10, 2018, at which time Schmid referred him back to the detailed discussions of the spreadsheet on August 1. (R. Ex. 3 at 0395-0396.)

Despite the Union’s assertions to the contrary, the Hospital’s *initial Wages* proposal did not give it “unfettered discretion.” Within the Hospital’s *initial Wages* proposal, there were non-discretionary bonuses and non-discretionary differentials. There was also a minimum 2% raise for every employee in Year 1, and published ranges within which employees had to be placed. *See, e.g., Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019) (even though employer’s wage proposal reserved right to set wage rates, the proposal did not provide for “unbridled discretion” where the rates would have to fall within published ranges). There was indeed a merit component, but it is not illegal for an employer to bargain for merit-based pay, especially as a starting position.

II. Combination of Proposals and the Union’s Failure to Negotiate

The Union claims that Respondents did not provide “one citation to a Board decision sustaining the lawfulness of such a combination of proposals as the ALJ found in this instance.” (UR at 12.) However, the Union has failed to identify a single case where a party’s nonfeasance at the table has been rewarded with the very real implication of overturning the employees’ choice to proceed without representation.

All of the cases cited by the Union and the ALJ are distinguishable, as in every one of them, the Union fully participated in negotiations, but despite those efforts, the employer was intransigent (*i.e.*, adhered to its proposals). Here, the Hospital made multiple initial and early proposals that the Union simply complained about but never countered; they did not test the Hospital’s willingness to negotiate. As cited by the ALJ and the Union:

- *Kitsap Tenant Support Services, Inc.*, 366 NLRB 98 (2018): The “unfettered discretion over wages, broad management rights clause, ineffective grievance procedure” (UR at 11)

followed the Union providing at least two complete contract proposals to the employer (July and September 2012). *Id.* at p. 3.

- *Target Rock*, 324 NLRB 373, 386-87 (1997), *enfd*, 172 F.3d 921 (D.C. Cir. 1998): The “broad Management Rights, ineffective arbitration procedure and no-strike provisions” (UR at 11) were made after a course of negotiations, a strike, a return to work, and on July 2, the union making a counterproposal accepting the employer’s last offer (which the ALJ described as “substantial movement,” notably absent here), which the employer rejected and countered with “a proposal that had little substantive relationship to what [the employer] had been seeking” and that removed previously-offered union security, removed previously-offered arbitration, removed seniority, injected at-will employment for the first time, and included a no-strike clause but no no-lockout provision. *Id.* at 385-86.

- *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), *enfd*, 732 F.2d 872 (11th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984): The “expansive management rights, broad no-strike and exclusion of disciplinary decisions from grievance-arbitration procedure” (UR at 11-12) was in fact the result of actual negotiations by the Union via counterproposals testing the employer’s willingness to bargain (management rights on February 5 and 27 and March 6 (*Id.* at 851-52), no-strike on September 14 (*Id.* at 853), and discipline on January 12 after which the company never countered (*Id.* at 854)).

- *Public Service of Oklahoma*, 334 NLRB 487, 498 (2001): The “broad management rights, no-strike, and a virtually meaningless arbitration provision” (UR at 12) were *final proposals*, and were coupled with a no strike clause not in existence here. *Id.* at 488-489.

A review of the bargaining notes reveals that time and time again, the Hospital asked the Union to counter its proposals. *See Respondent's Brief in Support of Exceptions, p. 19, fn. 12.*

Even a cursory review of the proposals at issue here reveals:

DATE	ARTICLE	COMMENT	R. Ex. 3
02/23/17	Discipline	Bernstein: "If you could get us a counter on that."	0157, ¶14
03/28/17	Management Rights	Bernstein: "What I don't have is a written proposal from you guys."	0165, ¶6
04/05/17	Union Security	Bernstein: "You're welcome to propose counters."	0182, ¶1
04/05/17	Grievance & Mediation	Bernstein: "You are always welcome to counter."	0186, ¶16
04/05/17	Discipline	Bernstein: "Let me put it this way, I would welcome a counter to this language."	0201, ¶2
04/05/17	Discipline	Bernstein: "We're awaiting counter."	0201, ¶10
04/05/17	Union Security	Bernstein: "Going into March, union security which you don't want to counter."	0202, ¶10
04/06/17	Discipline	Bernstein: "We never got a counter from you"	0210, ¶¶10-12
05/21/18	Wages	Schmid to Barner: "Well then, counter."	0310, ¶5
		Bernstein to Godoff: "We will accept a counter."	0311, ¶1
05/21/18	Discipline	Schmid: "Can you counter?" Bernstein: "Just send us something."	0322, ¶¶8, 10
09/05/18	Union Security	Schmid: "It's like pulling teeth to get a proposal in writing with tracked changes."	0362, ¶1
09/06/18	Management Rights	Schmid: "Well we would like it in writing; it's hard to keep track of it, we would like a counter in writing, and we are not writing your counters for you."	0371, ¶17
09/06/18	Union Security	Bernstein: "We would certainly welcome counters on it."	0383, ¶6
10/10/18	Wages	Schmid: "We gave you a proposal in May and you haven't responded to it"	0400, ¶12
		Schmid: "We explained it to you. You haven't countered."	0400, ¶14

While the Union contends it did not “walk away from bargaining” like the employer in *Audio Visual Services Group, Inc.*, 367 NLRB 103 (2019) (“*PSAV*”) either before or after filing their ULPs, as demonstrated above, it essentially did. Just as an employer cannot show up and simply go through the motions with no real intent of reaching agreement, neither can a union. Here, the Union “walked away” from G&M, No Strike, Management Rights, and Union Security, leaving all of the Hospital’s proposals dormant and uncountered between March 2017 and September 2018 (absent No Strike that the Hospital withdrew in June 2018 despite not having received any counter from the Union). This is the equivalent of “walking away,” just like the union in *PSAV*.

III. Union Security

With respect to **Union Security**, the Union contends that the justifications offered by the Hospital were not “legitimate.” This is disingenuous at best, as Union representative Lisa Wallace confirmed that she was aware that at least “a few” employees had complained about having to pay Union dues. (R. Ex. 3 at 0181.) Perhaps realizing that it needed to actually try and negotiate this Article, on September 5, the Union offered up a League Proposal. (R. Ex. 2 at 3818.) In its Response, the Union claims that it did not realize the Hospital was waiting for the photocopied League Proposal to be tailored to GWUH as it “never said so.” (UR at 20) However, during discussions about the Union’s counter on September 6, the Hospital pointed out the inapplicable references littered through the Union’s proposal (*e.g.*, a reference to an “Article 18”), and Godoff responded, “Alright well that’s fine we can clear that up.” (R. Ex. 3 at 0382.) As such, the Union’s explanation for its failure to negotiate defies all credulity.

WHEREFORE, Respondents District Hospital Partners, L.P., d/b/a George Washington University Hospital and UHS of D.C., Inc. respectfully submit that the ALJ's findings should be reversed in their entirety.

Submitted this 27th day of November, 2019:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlr.gov, and duly served electronically upon the following named individuals on this 27th day of November, 2019:

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